No. 80-1315

APR 17 19
ALEXANDER L. S
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

HAWAII, VERMONT, DELAWARE AND ALASKA, PETITIONERS

v.

WILLIAM K. MEDERIOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Beshaw v. *Fenton*, No. 79-1777 (3d Cir. Dec. 15, 1980), petition for cert. pending, No. 80-6354 (filed Mar. 13, 1981) 5, 6

Fletcher v. *Warden*, Nos. 79-1156, etc. (10th Cir. Feb. 13, 1981) 5

Howe v. *Civiletti*, 625 F. 2d 454, cert. granted *sub nom. Howe* v. *Smith*, No. 80-5392 (Jan. 26, 1981) 1, 5, 6

Lono v. *Fenton*, 581 F. 2d 645 ..... 1, 2, 3, 4, 5

Meachum v. *Fano*, 427 U.S. 215 4

Montanye v. *Haymes*,, 427 U.S. 236 4

Morrissey v. *Brewer*, 408 U.S. 471 ..... 1, 5

Mulholland v. *Elsea*, appeal pending, Nos. 80-1780, 80-1567 (filed June 5, 1980) 4

Sisbarro v. *Warden*, 592 F. 2d 1, cert. denied, 444 U.S. 849 5

Wetmore v. *Elsea*, appeal pending, Nos. 80-1781, 80-1697 (filed June 5, 1980) 4

Statutes and rule:

18 U.S.C. 5003 4

18 U.S.C. 5003(a) 2, 3, 5

28 U.S.C. 1651 3

Sup. Ct. R. 21.1(a) 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1315

HAWAII, VERMONT, DELAWARE AND ALASKA, PETITIONERS

v.

WILLIAM K. MEDERIOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

The petitioning States seek review of the decision of the United States Court of Appeals for the Seventh Circuit reaffirming its en banc holding in *Lono* v. *Fenton*, 581 F. 2d 645 (1978), that 18 U.S.C. 5003(a) conditions the authority of federal officials to accept custody of state prisoners on a showing that the prisoners are in need of specialized treatment available only in the federal system, and further holding that prior to such a transfer there must be a federally conducted hearing accompanied by the same panoply of procedural protections that is required in parole revocation hearings (see *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972)) in order to determine the need for specialized treatment and how it could be met in the federal system. Because these same questions are already before the Court in *Howe* v. *Smith*, petition for cert. granted, No. 80-5392 (Jan. 26, 1981) (argument scheduled for Apr. 28, 1981), we submit that the Court should hold the instant petition pending its decision in *Howe* v. *Smith*.

1. Following their convictions and incarceration for various offenses in five different states—Vermont, Alaska, Hawaii, Delaware and New Mexico[1]—the 12 prisoner respondents were transferred from state to federal custody because of their need for maximum security incarceration and/or protective custody, which the States could not provide. The transfers were carried out pursuant to contracts entered into between the federal and respective state governments under 18 U.S.C. 5003(a). Pet. App. A-4 to A-5 & n.3.[2] Although some of the prisoners were afforded state-conducted pre-transfer hearings (Pet. App. A-5 to A-9 & nn. 4-9), no hearings were provided by the federal government.

The 11 prisoner respondents who were incarcerated in the United States Penitentiary at Marion, Illinois, filed petitions for writs of habeas corpus in the United States District Court for what is now the Southern District of Illinois.[3] They named as respondent George C. Wilkinson, Warden of the Marion Penitentiary, and alleged that their transfers from state to federal prison because of insufficient state maximum security facilities were invalid under 18 U.S.C. 5003(a), as construed by the en banc Seventh Circuit in *Lono* v. *Fenton, supra*. The United States Magistrate granted motions to intervene filed by Vermont's Commissioner of Corrections and the States of Hawaii, Alaska and

---

[1]The State of New Mexico has never intervened in these proceedings.

[2]18 U.S.C. 5003(a) provides in pertinent part:

> The Attorney General, when the Director [of the Federal Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory * * *.

[3]The same area previously was designated the Eastern District of Illinois.

Delaware, and held individual hearings on each prisoner's petition. He consolidated the cases, however, for the purpose of his report (Pet. App. A-9 & n.10, A-38 to A-55), in which he stated that while he disagreed with the *Lono* court's construction of 18 U.S.C. 5003(a), he was bound by it; accordingly, he recommended "with reluctance" that the petitions be granted and that unless the prisoners were returned to their respective state correctional systems within 30 days writs of habeas corpus should issue and the prisoners be discharged (Pet. App. A-55). The district court, deeming itself "constrained to follow the law as set out by the Court of Appeals for the Seventh Circuit," adopted the magistrate's report and recommendation "with grave reservations" (*id.* at A-62). The district court stayed its order pending appeal (*id.* at A-9).

Respondent Lawrence, who was incarcerated in the Federal Correctional Institution at Oxford, Wisconsin, filed a similar petition for a writ of habeas corpus in the United States District Court for the Western District of Wisconsin, naming Robert I. Elsea, Warden of the Oxford Correctional Institution, as respondent. That district court also granted a motion to intervene by the Commissioner of Corrections of Vermont (Pet. App. A-9 to A-10 & n.11). Then, deeming itself "bound by the Seventh Circuit's decision in *Lono*" (*id.* at A-74; footnote omitted), the court granted the petition without an evidentiary hearing, ordering that Lawrence be returned to Vermont's correctional facilities within 30 days or be discharged from custody (*id.* at A-76).[4] Although the district court denied the state intervenor's motion to stay the order pending appeal, the court of appeals granted a stay (Pet. App. A-10).

---

[4]Lawrence's case was decided together with the cases of two other Oxford prisoners who, rather than petitioning for writs of habeas corpus, had filed civil actions in mandamus under 28 U.S.C. 1651, also

On appeal by the federal wardens and the intervening state parties, Lawrence's case was consolidated with those from the Southern District of Illinois. In its decision, the Seventh Circuit adhered to the *Lono* view that 18 U.S.C. 5003 "requires a showing of a state prisoner's need for specialized treatment as a condition precedent to transfer to the federal prison system" (Pet. App. A-11), observing that "principles of stare decisis make it quite undesirable for us to reconsider here the legal propositions announced in *Lono*" (Pet. App. A-13; footnote omitted). The court of appeals recognized, however, that transfers based on security considerations may satisfy the "specialized treatment" requirement of *Lono* "if a sufficient array of programs is provided in connection with incarceration in a maximum security prison" (Pet. App. A-17). Nonetheless, the court of appeals held that the transfers at issue were impermissible because the prisoners had not been accorded due process.[5] Contrasting the discretionary transfer of prisoners within a particular system upheld by this Court in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), with the state-to-federal transfers authorized by 18 U.S.C. 5003, the court of appeals found (Pet. App. A-21) that Section 5003 creates in state prisoners "a

---

seeking relief from federal custody. The district court treated the mandamus actions as if they had been brought as habeas corpus actions (Pet. App. A-64) and granted the same relief to those prisoners as it granted Lawrence (*id.* at A-76). Thereafter, however, while the federal warden and the state intervenor appealed the decision in Lawrence's case, the district court granted the government's motion to reconsider the two mandamus actions. After reconsideration, the district court again granted the relief requested by the two prisoners. That decision was also appealed to the Seventh Circuit, where it is currently pending. *Mulholland* v. *Elsea*, Nos. 80-1780, 80-1567, and *Wetmore* v. *Elsea*, Nos. 80-1781, 80-1697 (filed June 5, 1980).

[5]In *Lono*, the court had found it unnecessary to decide what process was due a state prisoner prior to his transfer to the federal system (581 F. 2d at 646).

liberty interest deserving of due process protection." Accordingly, the court held that "there must be a federally conducted hearing" (Pet. App. A-27 to A-29), accompanied by the same panoply of procedural protections that is required in parole revocation hearings (see *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972)), in order to determine "the need for specialized treatment and * * * how it could be met in the federal system" (Pet. App. A-26).[6]

2. The decisions of the Seventh Circuit in *Lono* and in the present case squarely conflict with the decisions of every other court of appeals that has considered the construction of 18 U.S.C. 5003(a). *Fletcher* v. *Warden*, Nos. 79-1156, etc. (10th Cir. Feb. 13, 1981); *Beshaw* v. *Fenton*, No. 79-1777 (3d Cir. Dec. 15, 1980), petition for cert. pending, No. 80-6354 (filed Mar. 13, 1981); *Howe* v. *Civiletti*, 625 F. 2d 454 (2d Cir. 1980), cert. granted *sub nom. Howe* v. *Smith*, No. 80-5392 (Jan. 26, 1981) (argument scheduled for Apr. 28, 1981); *Sisbarro* v. *Warden*, 592 F. 2d 1 (1st Cir.), cert. denied, 444 U.S. 849 (1979). Despite this conflict, however, we believe that it is unnecessary for the Court to grant the petition for a writ of certiorari at this time.

The first issue presented by the instant petition—whether 18 U.S.C. 5003(a) conditions the authority of federal officials to accept state prisoners into custody on a showing that the prisoners are in need of specialized treatment available only in the federal system—is already before the Court in *Howe* v. *Smith*, *supra*. If the Court in *Howe* agrees with us that that question should be answered in the negative,

---

[6]On February 27, 1981, the court of appeals denied the federal government's petition for rehearing, which had requested the court to delay final decision in the case until this Court's decision in *Howe* v. *Smith*. The petitioning States have filed a motion, in which the federal government has joined, to stay the mandate of the court of appeals pending this Court's action on their petition for a writ of certiorari. The Seventh Circuit has not yet acted on that motion.

there will be no need for consideration of the due process issue. In the alternative, if the Court in *Howe* should find that the federal government's authority to accept state prisoners is not unconditional, it may then consider the due process issue, which has been briefed by the parties.[7] In the event that its decision in *Howe* does not dispose of all of the questions raised by the instant case, the Court can determine at that point whether the remaining questions merit its plenary consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held for disposition as appropriate in light of this Court's decision in *Howe* v. *Smith*, *supra*.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

---

[7]Although the petitioner in *Howe* did not raise the due process issue in the lower courts and although we do not view it as "fairly included" in the question presented in that case (see Rule 21.1(a) of the Rules of this Court), the Court may wish to decide the issue in the interest of judicial economy, since it is presented not only in the instant case, but in *Beshaw* v. *Fenton*, *supra*, as well.